(1)

(4)

CP 15

IN THE HIGH COURT OF JUDICATURE AT BILASPUR,

CHHATTISGARH Single Bench

Miscellaneous Appeal No. 988 of 2004

APPELLANT/:
(Defendant No.1)

Beer Singh, S/o Umedram,
Aged about 19 years,
R/o Village: Khargaon,
Tehsil: Kharsia,
District: Raigarh, Chhattisgarh.

- Versus -

RESPONDENTS/:
(Plaintiffs)

1. Pratap Singh, S/o Kushal Singh, Aged about 60 years.

2. Talam Singh, S/o Kushal Singh Sidar, Aged about 47 years.

Both residents of Village: Khargaon, Tehsil: Kharsia, District: Raigarh, Chhattisgarh.

P.R. No. 2116/02
Presented by Shri R. Singh
dated 22-9-04

(Defendants)

3. Smt. Brindabai, Widow of Kushal Singh, Aged about 80 years.

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22.9.04
Clerk to A.G. Bilaspur

4. Bhagwat Singh,
S/o Bhutneshwar,
Aged about 40 years.

5. Darbar Singh,
S/o Bhutneshwar Singh,
Aged about 35 years.

6. Dadu Singh,
S/o Bhutneshwar Singh,
Aged about 38 years.

7. Sukmetbai,
Widow of Bhutneshwar Singh,
Aged about 70 years.

(5)

Respondents No.3 to 7 all residents of Village: Khargaon, Tehsil: Kharsia, District: Raigarh, Chhattisgarh.

8. State of Chhattisgarh, Through: Collector, District: Raigarh, Chhattisgarh.

MISCELLANEOUS APPEAL UNDER ORDER 43 (1) (r) OF THE CODE OF CIVIL PROCEDURE

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उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

AFR

मामला क्रमांक M.A. 988/04 **सन्** ~~200~~

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

22.02.2005:-

Shri Sanjay K.Agrawal, learned counsel for the appellants.
Shri Amit Sharma, learned counsel for Caveators/respondents1& 2.

This is the miscellaneous appeal under Order 43 Rule (1) (r) of the C.P.C. preferred against the order of temporary injunction passed by the trial Court.

The parties hereinafter shall be described as they were described before the trial Court.

The suit for declaration and temporary injunction was filed the plaintiffs, as the sale deed executed by defendant No. 2 in favour of defendant No. 1 is not binding on the plaintiffs and thus, does not transfer any title to the purchaser by defendant No. 2.

The case of the plaintiffs before the trial Court is that late Kushal Singh and Bhuwneshwar Singh were the owners of 33.804 hectares of land and after their death, the land was recorded in the name of their successors. However, the widow of Kushal Singh i.e. defendant No. 2 got her name mutated over the suit land. Though the widows by their cast do not succeed in their community and they are entitled for livelihood and maintenance only. It was further pleaded that the plaintiffs did not object recording of the name of defendant No. 2 in the revenue records as they had good relationship and defendant No.1 was never in possession of the suit property. On the instigation of defendant No. 1 on about 01.06.2003, defendant No.2 applied for partition of the suit land as described in schedule 'A'. The Nayab Tehsildar, Kharasiya vide order dated

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उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक M.A. 908/04 **सन्** ~~200~~

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश — 2 —	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

09.09.2003 allotted disputed land of 2.247 hectares in the share of defendant No.2 against which they preferred an appeal before S.D.O., Kharasiya which was dismissed vide order dated 29.09.2003. During the pendency of the appeal before the S.D.O., Kharasiya vide sale deed dated 30.09.2003, the suit land was transferred by defendant No. 2 in favour of defendant No. 1 for a consideration of Rs. 1,55,000/-. It was further submitted that the plaintiffs are in joint possession over the suit property since the time of their ancestors and this possession is continue even after execution of the transfer deed. Along with this civil suit, the plaintiff also filed an application for temporary injunction averring that the suit property was recorded in the name of plaintiffs and defendant No. 2 to 6 and for the convenience they have partitioned the suit property between plaintiffs and defendant No. 3, 4 and 5 as the plaintiffs belonged to *Gond* community and Hindu Succession Law shall not be applicable and they are governed by the customs prevailing in their community in which widows and daughters do not succeed in the ancestral properties and agricultural land.

Though, the plaintiffs are in possession of the suit property even after execution of the sale deed. However, defendant No. 1 is trying to dispossess the plaintiffs. Defendant No.2 in her written statement denied the allegations of the plaint and stated that though they are by cast *gond* but they are followers of the Hindu religion and they have adopted Hindu rites and also they are governed by Hindu Succession Act and Indian Succession Act. It has been further pleaded that after death of her husband namely Kushal Singh in the year 1993-94, her name was

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मामला क्रमांक M.A. 988/06 **सन्** ~~200~~

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —3—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

mutated in the revenue records to the knowledge of the defendants. She further submits that the suit land was orally partitioned between the plaintiffs and the other family members during the time of her husband and on the basis of the said oral partition, the parties were in separate possession of the allotted share for the last 25-30 years. It is submitted by her that she has executed the sale deed after full consideration and transferred the possession of the suit property on the date of sale and thus, defendant No. 2 is in possession since 30.09.2003.

Defendant No. 1 in his reply has stated that defendant No. 2 has transferred her share in the suit property after getting full consideration, through registered sale deed. He further submits that he is also by cast *gond* and they are governed by Hindu Succession Act. He further states plaintiffs and defendant No. 2 are living separately since the lifetime of the husband of defendant No.2 namely Brinda Bai and they are cultivating over the suit property. On the basis of oral partition, the possession of the suit land has been transferred to defendant No. 2 and by the sale deed executed by her, defendant No. 1 got the possession and since then he is in possession.

Learned trial Court passed an order of temporary injunction restraining the defendant No. 1 from interfering with the possession of the plaintiff and against this order this appeal has been preferred.

Learned counsel for the appellant/defendant No. 1 submits that the plaintiffs and defendants are *gond* by cast and as per Section 2(2) of the Hindu Succession Act, the provisions of Hindu Succession Act, is not

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मामला क्रमांक M.A. 988/04 **सन्** ~~200~~

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -4-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

applicable to them. He further submits that in paragraph 18 of the impugned order, even after recording a finding that it is yet to be decided whether the persons belonging to schedule tribe have adopted the Hindu Succession Act, 1956 or not. It has been held that it is a prima facie case in favour of the plaintiffs. The counsel for the appellant/defendant No. 1 argues that though there is recital in the sale deed by the vender that she has executed sale deed after obtaining full consideration and therefore, defendant No. 1 is in possession over the suit property and in her written statement, defendant No. 2 has stated that she has transferred the land after obtaining the consideration. Even then, the learned Court below in paragraph 23 of the impugned order has recorded a surmise that prima facie the sale deed appears to be without consideration, relying upon the judgment reported in ***AIR 2000 S.C. 426*** in the matter of ***Ishwar Dass Jain (dead) through L.Rs. Vs. Sohan Lal (dead) by L.Rs.***. Learned counsel for the appellant/defendant No.1 submits that there is a presumption of correctness in the endorsement made by the Sub-registrar under Section 58 of the Registration Act, and it can be rebutted only by a cogent and strong evidence. In the present case also learned Court below ought to have drawn this presumption for adjudicating the application for temporary injunction. He further submits that learned Court below has recorded a finding that it is still to be decided whether the provision of Section 2(2) of Hindu Succession Act, 1956 are applicable in the present case or not.

Taking into consideration the rival contentions of the plaintiffs and defendant No. 2, the Court below has wrongly held that the prima facie

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मामला क्रमांक M.A. 988/04 **सन् 200-**

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -5-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

case was in favour of the plaintiffs. Relying upon the judgement passed by ***M.P. High Court*** in the matter of ***Kailash Singh Vs. Mewalal Singh Gond*** reported in ***AIR 2002 M.P. 112***, learned counsel for the appellant/defendant No. 1 submits that the plaintiff is required to plead and prove that the customs prevailing in the community are the part of Hindu law as modified by the statutory law i.e. Hindu Succession Act, 1956 and thus, it is applicable in their community. Reliance is also placed upon the decision reported in ***2000(8) SCC, 587*** in the matter of ***Labishwar Manjhi Vs. Pran Manjhi and Others***.

In contra, learned counsel for the respondents submits that the impugned order has been passed on the basis of cogent reasoning and it does not call for any interference. He further submits that parties are by cast *gond* and as per provision of Section 2(2) of Hindu Succesion Act, they are not governed by the Act of 1956 and the widows and daughters do not succeed as per prevailing customs in the *gond* community. He further submits that they initiated the partition proceedings in the Court of S.D.O. and the sale deed was got executed and as such the vender has no right to execute the sale deed as all the co-sharers are owners of each and every piece of land recorded in their names. He also submits that they are in joint possession of the suit property and defendant No. 2 had never obtained possession and thus, the order of partition in her favour is under challenge. Referring to paragraph 23 of the impugned order, learned counsel submits that even after passing the stay order dated 29.02.2003 by the S.D.O, Kharasiya, which was in force, the sale deed was executed on 30.09.2003. Relying upon the decision reported in ***AIR***

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मामला क्रमांक M.A. 988/04 सन् 200—

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —6—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

1996 Supreme Court, 1864 in the matter of ***Madhu Kishwar and others Vs. State of Bihar and others*** learned counsel submits that it is stated in paragraph 47 and 48 of the above cited judgement that neither the Hindu Succession Act nor the Indian Succession Act is applicable to the custom governed tribals. And custom, as is well recognized, varies from people to people and region to region and it is not desirable to declare the customs of tribal inhabitants as offending Article 14,15 and 21 of the Constitution and each case must be examined when full facts are placed before the Court. Further relying upon the judgment of ***H.P. High Court*** reported in ***AIR 2002 H.P. (77)*** in the matter of ***Sonam Dolma and others Vs. Phunchog Angrup and others***, learned counsel for the plaintiffs submits that as the parties are *gond* by cast, the Act of 1956 is not applicable and the sale deed executed by female is invalid.

I have heard learned counsel for the parties and gone through the case law cited by the respective parties. This is the preliminary stage of the suit and at this stage it is not possible for the trial Court to arrive at a definite conclusion whether defendant No. 2 succeeded the property as limited owner as per Hindu law before the Act of 1956 or became full owner as per provisions of the Act of 1956 and this fact shall be proved during the trial. At some places in the impugned order, it has been rightly recorded by the Court below also. However, the learned trial Court as arrived to the conclusion that the plaintiff has a prima facie case on the ground that Hindu Succession Act is not applicable to the parties because they belonged to *gond* community. This finding is at variance with the finding that the matter is to be decided at the time of trial. The Court

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मामला क्रमांक M.A.988/04 सन् ~~200~~

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -7-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

below has also arrived to the conclusion that the parties were in joint possession of the suit property and there was no partition in the family. However, in the application for temporary injunction it has been averred that for the sake of convenience, the suit property has been partitioned between the plaintiffs and defendants No. 3 to 6. The finding of the trial Court that the sale deed is without any consideration, is also without any evidence and contrary to material available on record as the vender and vendee both have categorically stated in their pleadings that the sale deed was executed by defendant No. 2 after obtaining full consideration and the possession was delivered on the date of sale. Even there is a recital to this effect in the sale deed and it has been endorsed by the Sub-registrar and thus, there is presumption that the consideration was paid for the same.

The Court below has also lost sight of the fact that in a bipartite partition proceedings, the suit land was ordered to be partitioned and the appeal preferred by the plaintiff has been dismissed by the Appellate Court. The pleadings of the defendant No. 2 that there was a partition during the lifetime of her husband from 25 -30 years back finds support in the averment of the application for temporary injunction. Thus, the finding of the trial Court that the plaintiff has established a prima facie case appears to be erroneous and the prima facie case, if any, was in the favour of defendant No. 1 for the reasons stated in the foregoing paragraph. For present case, the suit land has been purchased by defendant No. 1 from defendant No. 2 by paying a consideration of Rs. 1,55,000/- which is a substantial sum and if the suit is decreed in favour of

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -9-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

defendant, then the land in question shall be reverted to the plaintiffs and the plaintiffs may be compensated suitably for the losses that they shall be incurring.

For the aforesaid reasons, the impugned order passed by the Courts below restraining defendant No.1 from interfering with the possession of the plaintiff over the suit land deserves to be dismissed and accordingly this appeal is allowed and the impugned order is set aside.

With the aforesaid observations, M.C.P.No. 1408/2004 stands disposed of.

Parties are entitled for certified copy of the order.

Sd/-
Dhirendra Mishra
Judge